

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PERIDOT TREE WA INC,

Case No. 3:23-cv-06111-TMC

Plaintiff,

ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION

V.

WASHINGTON STATE LIQUOR AND

CANNABIS CONTROL BOARD;

WILLIAM LUKELA,

Defendants.

I. INTRODUCTION

In 2020, the Washington State legislature established a Social Equity Program for awarding retail cannabis licenses that aimed to help those applicants most adversely impacted by previous drug prohibition laws enter the State's legal cannabis market. Through its eligibility criteria and scoring rubric, the program favors applicants who have lived in areas of Washington that were disproportionately impacted by prosecution of cannabis offenses, have been arrested for or convicted of a cannabis offense, and earn below-median income. The program requires applicants to have resided in Washington for at least six months, and the rubric favors those who have lived in a disproportionately impacted area in Washington for a long period of time.

1 Plaintiff Peridot Tree’s (“Peridot”) majority owner/shareholder is a Michigan resident
2 who has lived in a disproportionately impacted area in Michigan for over twenty years, was
3 convicted of a cannabis-related offense under Michigan law, and earns an income that falls
4 below Washington’s median. Peridot applied for a Social Equity Program license in Spring 2023,
5 but the Washington State Liquor and Cannabis Board rejected its application for failure to meet
6 the minimum residency qualifications.

7 Peridot challenges the Social Equity Program’s provisions that require or favor
8 Washington residency, arguing that they violate the dormant Commerce Clause. Shortly after
9 filing this lawsuit, Peridot moved for preliminary injunctive relief, asking this Court to enjoin the
10 Liquor and Cannabis Board from issuing final licenses to the successful Social Equity Program
11 applicants. Dkt. 6. While recognizing that courts around the country have split on the question,
12 this Court concludes that Peridot is unlikely to succeed on the merits because the dormant
13 Commerce Clause does not protect a right to participate in an interstate market that Congress has
14 declared illegal. For this reason, and for those explained further below, the Court DENIES
15 Peridot’s motion for a preliminary injunction.

16 II. BACKGROUND

17 Plaintiff Peridot Tree WA, Inc. (“Peridot”) is an applicant for a retail cannabis dispensary
18 license from the State of Washington through its Social Equity Program. Defendants are the
19 Washington State Liquor and Cannabis Board (the “LCB”) and William Lukela in his official
20 capacity as Director of the LCB. The following facts are undisputed by the parties.

21 A. Sale of Cannabis under Federal Law

22 Under the Controlled Substances Act (“CSA”), it is unlawful “to manufacture, distribute,
23 or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled
24 substance,” including cannabis. 21 U.S.C. § 841(a)(1); *see* 21 U.S.C. § 812(c) (classifying

1 cannabis as a Schedule I substance). Although cannabis remains illegal under federal law, the
2 federal government generally does not prosecute the sale of cannabis that complies with state
3 law. *See* Dkt. 18 ¶ 12.

4 In 2013, following the legalization of cannabis in Colorado and Washington, U.S. Deputy
5 Attorney General James Cole issued a memorandum entitled “Guidance Regarding Marijuana
6 Enforcement” (the “Cole Memo”). Dkt. 18-1. The memorandum directed U.S. Attorneys to
7 prioritize the following enforcement priorities: Preventing “the distribution of marijuana to
8 minors;” “revenue from the sale of marijuana from going to criminal enterprises, gangs, and
9 cartels;” “the diversion of marijuana from states where it is legal under state law in some form to
10 other states;” “state-authorized marijuana activity from being used as a cover or pretext for the
11 trafficking of other illegal drugs or illegal activity;” “violence and the use of firearms in the
12 cultivation and distribution of marijuana;” “drugged driving and the exacerbation of other
13 adverse public health consequences associated with marijuana use;” “the growing of marijuana
14 on public lands and the attendant public safety and environmental dangers posed by marijuana
15 production on public lands;” and “marijuana possession or use on federal property.” *Id.* at 2–3.
16 The memorandum stated that jurisdictions that have legalized cannabis and have strong
17 regulatory and enforcement systems are “less likely to threaten the[se] federal priorities.” *Id.* at
18 3. The memorandum instructed U.S. Attorneys to focus their enforcement resources and efforts,
19 including prosecution, on persons or organizations whose conduct interferes with any one or
20 more of these priorities, regardless of state law. *Id.* at 2. It further directed them, when exercising
21 prosecutorial discretion, to consider whether a cannabis “operation is demonstrably in
22 compliance with a strong and effective state regulatory system” and “whether the conduct at
23 issue implicates one or more of the enforcement priorities.” *Id.* Although Attorney General Jeff
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1 Sessions rescinded the memorandum, the Department of Justice has continued its practice of
 2 prosecutorial discretion in states that have legalized cannabis. *See* Dkt. 18-2 at 1–3.

3 **B. Sale of Cannabis under Washington State Law**

4 In 2012, Washington voters enacted Initiative Measure 502 (“I-502”), legalizing the
 5 possession and sale of cannabis.¹ Dkt. 18 ¶ 1. I-502 authorized the LCB to regulate and tax
 6 Washington’s cannabis market. I-502 § 1(3); Dkt. 18 ¶ 2 (citing 2013 Wash. Sess. Laws 29;
 7 RCW §§ 69.50.331(4), .342, .345 (2013)).

8 Businesses and individuals must have a license from the LCB to sell or distribute
 9 cannabis in Washington. RCW § 69.50.3251(1). Washington voters approved a residency
 10 requirement for cannabis licenses when they voted to legalize cannabis in 2012. Dkt. 18 ¶ 3; I-
 11 502 § 6(b) (requiring residency in Washington for at least three months); RCW § 69.50.331(1)(b)
 12 (2012) (same). Washington has had a six-month residency requirement since 2015, when the
 13 State merged the retail and medical cannabis markets. RCW § 69.50.331(1)(b) (2015). Under the
 14 current regulation, the LCB may not issue a license to anyone who does not meet the following
 15 age and residency requirements:

- 16 (i) A person under the age of 21 years;
- 17 (ii) A person doing business as a sole proprietor who has not lawfully resided in the
 state for at least six months prior to applying to receive a license;
- 18 (iii) A partnership, employee cooperative, association, nonprofit corporation, or
 corporation unless formed under the laws of this state, and unless all of the members
 thereof are qualified to obtain a license as provided in this section; or
- 19 (iv) A person whose place of business is conducted by a manager or agent, unless
 the manager or agent possesses the same qualifications required of the licensee.

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 23
 24 ¹ Available at https://www.sos.wa.gov/_assets/elections/initiatives/i502.pdf.

1 RCW § 69.50.331(1)(b). The LCB must perform a residency check to confirm license applicants
2 meet the six-month Washington state residency requirement. WAC 314-55-020(1)(d).

3 Rebecca Smith, the LCB’s Director of Licensing, attests that these “[r]esidency
4 [r]equirements are a necessary component of Washington’s strong and effective regulatory and
5 enforcement systems for its regulated marijuana industry.” Dkt. 18 ¶ 11. They help Washington
6 meet the enforcement priorities set out in the Cole Memo and ensure Washington’s cannabis
7 “enforcement efforts are sufficiently robust to protect against the harms.” *Id.* (quoting Dkt. 18-1);
8 *see also* Dkt. 18-4 at 5–6 (“Many marijuana regulations are justified as necessary to comply with
9 the federal government’s marijuana enforcement priorities laid out in the Cole Memo
10 Related to residency requirements is the priority of ‘[p]reventing the diversion of marijuana from
11 states where it is legal under state law in some form to other states.’”). “[A]s a result, [the
12 residency requirements] help to prevent federal interference in [Washington’s] market” or
13 regulatory structure. Dkt. 18 ¶ 11. Smith further explains that states without residency
14 requirements tend to experience an overproduction of cannabis, which leads to diversion to other
15 states. *Id.* ¶ 20.

16 **C. Social Equity Program**

17 In 2020, the Washington Legislature created the Social Equity Program as an effort “to
18 reduce barriers to entry to the cannabis industry for individuals and communities most adversely
19 impacted by the enforcement of cannabis-related laws,” and to “establish[] a cannabis industry
20 that is equitable and accessible to those most adversely impacted by the enforcement of drug-
21 related laws, including cannabis-related laws.” 2020 Wash. Sess. Laws Ch. 236 § 1(1). The
22 Social Equity Program established that the LCB would reserve cannabis retail licenses
23 exclusively for social equity applicants. RCW § 69.50.335(1)(a), (2)(a).

The LCB adopted the Social Equity Program criteria and application process in October 2022, and those regulations became effective the following month. *See WAC 314-55-570 (2022).* Each applicant must meet the following criteria to be considered for the Social Equity Program:

(b) At least a 51 percent majority, or controlling interest, in the applicant, must be held by a person, or persons, who has or have resided in Washington state for six months prior to the application date, consistent with RCW 69.50.331, and meets at least two of the following qualifications:

(i) Qualification 1: The social equity applicant or applicants have lived in a disproportionately impacted area in Washington state for a minimum of five years between 1980 and 2010; or

(ii) Qualification 2: The social equity applicant or a family member of the applicant has been arrested or convicted of a cannabis offense; or

(iii) Qualification 3: The social equity applicant's household income in the year prior to submitting the application was less than the median household income within the state of Washington as calculated by the United States Census Bureau.

WAC 314-55-570(2). "Disproportionately impacted area" means:

[A] census tract within Washington state where community members were more likely to be impacted by the war on drugs. These areas are determined using a standardized statistical equation to identify areas of high unemployment, low income, and demographic indicators consistent with populations most impacted by the war on drugs, including areas with higher rates of arrest for drug charges. The board will provide maps to identify disproportionately impacted areas. The maps will reflect census tracts from different time periods to account for gentrification.

WAC 314-55-570(1)(a). The LCB posted maps identifying disproportionately impacted areas in Washington by decade from 1980 to 2010. Dkt. 7-3 at 1. The LCB evaluates applications according to the following rubric:

Social Equity Application Scoring Rubric		
Category	Eligibility Requirements	Point Scale
	1. Lived in a disproportionately impacted area (DIA)	40
	1a. How long have you lived in a DIA?	40
	5y - 10y = 20 points	
	10 + years = 40 points	
	2. Convicted of a drug offense? (Self)	10
	2a. Convicted of a cannabis offense? (Self)	40
	3. Convicted of a drug offense? (Family)	5
	3a. Convicted of a cannabis offense? (Family)	5
	4. If you were convicted of a cannabis offense, what type of sentence did you receive: Fine = 10 points Served probation = 20 points Confined to home = 40 points Served time in jail or prison = 80 points	80
	5. Did you or your family member's incarceration keep you from getting employment?	5
	6. Did you lose your home or ability to purchase a home or rent a home as a result of your convictions or arrests?	5
	7. Is your household income less than the median household income within the state of Washington as calculated by the United States Census Bureau?	40
	8. Did you own or operate a medical cannabis dispensary or collective garden, licensed as a business, prior to July 1, 2016 (10 points)? or Did you own and operate a medical cannabis dispensary or collective garden licensed as a business in a DIA (30 points)?	10 30 in a DIA
	9. Have you held or do you currently hold 51 percent majority/controlling interest of a state cannabis (marijuana) retailer license? No = 10 points Yes = 0 points	10
	Total Maximum Points	310 points

1 WAC 314-55-570(3)(c)(viii).

2 From March 1 to April 27, 2023, the LCB accepted applications for a total of 46 social
 3 equity licenses in 22 counties. Dkt. 7-1 at 1; Dkt. 7-2 at 1–2. Eight social equity licenses were
 4 available in King County. Dkt. 7-2 at 2. The LCB sent the applications to Ponder Diversity
 5 Group (“Ponder”), a third-party contractor, for evaluation. Dkt. 16 ¶¶ 7–8. Ponder required
 6 applicants to submit an online application and questionnaire, as well as supporting
 7 documentation. *Id.* ¶ 9. Ponder reviewed applications to determine which met the minimum
 8 requirements for licensure and the Social Equity Program. *Id.* ¶ 10. It then verified the eligible
 9 applications and scored them according to the LCB rubric. *Id.* ¶¶ 10–11. It did not further review
 10 ineligible applications. *Id.* ¶ 10. On August 31, 2023, Ponder sent the LCB the results of its
 11 evaluation, as well as the review spreadsheets, score sheets, and application materials and
 12 documentation. *Id.* ¶ 12. On September 17, 2023, the LCB notified the applicants, including 40
 13 successful applicants, of the results by email. *Id.* ¶¶ 13, 17; *see* Dkt. 7-5.

14 LCB’s emails to the successful applicants informed them that they were allowed to
 15 continue the licensing process. Dkt. 16 ¶ 13. Two of these applicants have informed the LCB that
 16 they have found storefront locations for rent. *See id.* ¶ 14. One of the two applicants is building
 17 out its store for a cost of \$125,000. *Id.* The other has completed building out the store, which has
 18 passed its final inspection, and has spent \$40,000; paying the licensure fee is the only remaining
 19 step for that applicant to receive a license. *Id.* The other successful applicants have not informed
 20 the LCB whether they have acquired a space or purchased equipment. *See id.* ¶ 15.

21 Peridot applied for a license in King County through the Social Equity Program. *See* Dkt.
 22 7 ¶ 3; Dkt. 16 ¶ 18. On September 17, 2023, the LCB notified Peridot that its application was
 23 withdrawn for failure to meet the minimum qualifications. Dkt. 7-5; Dkt. 16 ¶ 19. Peridot asserts
 24

1 that it meets all application requirements except those favoring Washington residents. Dkt. 27
 2 ¶ 22; Dkt. 6 at 6. Specifically, Peridot asserts that Kenneth Gay, who owns 51 percent of Peridot,
 3 has lived in a disproportionately impacted area in Michigan for over twenty years and was
 4 convicted of a cannabis offense under Michigan law. Dkt. 27 ¶ 24; Dkt. 6 at 6 (citing Dkt. 8 ¶¶ 4,
 5 6). Defendants also note that Peridot indicated in its application materials that its majority
 6 owner's household income was less than the median household income in Washington. Dkt. 15
 7 at 6.

8 **D. Procedural History**

9 Peridot filed a complaint with this Court on December 4, 2023 (Dkt. 27) and moved for a
 10 Temporary Restraining Order and Preliminary Injunction on December 8, 2023 (Dkt. 6). The
 11 Court denied the motion for a Temporary Restraining Order in an oral ruling on December 14,
 12 2023. Dkt. 23. On December 22, 2023, Peridot filed an amended complaint. Dkt. 27. The Court
 13 held oral argument on December 29, 2023.

14 Having considered the parties' briefs, the record, applicable law, and oral argument, the
 15 Court DENIES Peridot's motion for preliminary injunction.

16 **III. DISCUSSION**

17 **A. Preliminary Injunction Legal Standard**

18 A preliminary injunction "is a matter of equitable discretion and is an extraordinary
 19 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such
 20 relief." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quotation marks and
 21 citations omitted).

22 To obtain a preliminary injunction, a plaintiff must establish: (1) a likelihood of success
 23 on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that
 24 the balance of equities favors the plaintiff, and (4) that an injunction is in the public interest."

1 *Geo Group, Inc. v. Newsom*, 50 F.4th 745, 753 (9th Cir. 2022) (en banc) (citing *Winter v. Nat.*
 2 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). “When, like here, the nonmovant is the
 3 government, the last two *Winter* factors ‘merge.’” *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir.
 4 2023) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

5 The movant must make a showing on each element of the *Winter* test. *All. for the Wild*
 6 *Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). However, “[i]t is well-established that
 7 the first factor is especially important when a plaintiff alleges a constitutional violation and
 8 injury.” *Baird*, 81 F.4th at 1040. In such cases, establishing the first prong also “usually
 9 demonstrates [the movant] is suffering irreparable harm no matter how brief the violation” and
 10 “tips the public interest sharply in his favor because it is ‘always in the public interest to prevent
 11 the violation of a party’s constitutional rights.’” *Id.* (citing *Planned Parenthood Ariz., Inc. v.*
 12 *Humble*, 753 F.3d 905, 911 (9th Cir. 2014), *abrogated on other grounds by Dobbs v. Jackson*
 13 *Women’s Health Org.*, 597 U.S. 215 (2022)). Thus, when constitutional claims are at issue, the
 14 Court may not “skip over” the first prong and decide the case only on the other elements because
 15 of the “influence” that establishing the first prong has on the other factors. *Baird*, 81 F.4th at
 16 1044, 1046. However, a plaintiff may also compensate for a weaker showing of the first prong
 17 with a stronger showing of the balance of equities prong. *See Roman v. Wolf*, 977 F.3d 935, 941
 18 (9th Cir. 2020) (“[W]here the ‘balance of hardships . . . tips sharply towards the plaintiff,’ a
 19 plaintiff need only show ‘serious questions going to the merits,’ rather than likelihood of success
 20 on the merits.” (quoting *All. for the Wild Rockies*, 632 F.3d at 1135)).

21 “[T]he mere allegations of a complaint” do not suffice to obtain a preliminary injunction,
 22 *Takiguchi v. MRI Int’l, Inc.*, 611 F. App’x 919, 921 (9th Cir. 2015) (citing *Winter*, 555 U.S. at
 23 20), but the evidence submitted in support “need not strictly comply with the Federal Rules of
 24 Evidence.” *CI Games S.A. v. Destination Films*, No. 2:16-cv-05719-SVW-JC, 2016 WL

1 9185391, at *11 (C.D. Cal. Oct. 25, 2016) (citing *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389,
 2 1394 (9th Cir. 1984)). Neither party here has challenged the evidence submitted in support or
 3 opposition to the motion and the underlying facts are undisputed. The parties' arguments focus
 4 instead on questions of law.

5 **B. Standing**

6 Defendants argue that Peridot lacks Article III standing. Dkt. 15 at 8. Article III of the
 7 U.S. Constitution limits the Court's jurisdiction to "Cases" and "Controversies." U.S. Const.
 8 art. III, § 2. For a case or controversy to exist, the party bringing the case must have standing.
 9 *Perry v. Newsom*, 18 F.4th 622, 630 (9th Cir. 2021), *cert. denied sub nom., Hollingsworth v.*
 10 *Perry*, 143 S. Ct. 301 (2022) (citing *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013)). The
 11 "irreducible constitutional minimum" of Article III standing requires the plaintiff to show the
 12 following three elements: "(1) [The plaintiff] suffered an injury in fact, (2) that is fairly traceable
 13 to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
 14 judicial decision." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016); *see also Perry*, 18 F.4th at 630.

15 As the party invoking the Court's jurisdiction, the plaintiff "bears the burden of
 16 establishing these elements." *Spokeo*, 578 U.S. at 338. "At the preliminary injunction stage, the
 17 plaintiff must make a clear showing of each element of standing, relying on the allegations in
 18 their complaint and whatever other evidence they submitted in support of their [preliminary-
 19 injunction] motion to meet their burden." *LA All. for Hum. Rts. v. County of Los Angeles*, 14
 20 F.4th 947, 957 (9th Cir. 2021) (internal quotation marks and citations omitted). "The plaintiff[]
 21 'must demonstrate standing separately for each form of relief sought,' and the 'remedy must be
 22 tailored to redress [their] particular injury,'" *Id.* (fist quoting *Friends of the Earth, Inc. v.*
 23 *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000), and then quoting *Gill v. Whitford*,
 24 138 S. Ct. 1916, 1934 (2018)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352

1 (2006) (holding the plaintiff must show standing “for each claim” and “each form of relief
 2 sought”).

3 Injury in fact is the “[f]irst and foremost” of the three elements. *Spokeo*, 578 U.S. at 338.
 4 “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally
 5 protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural
 6 or hypothetical.’” *Id.* at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A
 7 concrete injury is one that is “real, and not abstract” *Spokeo*, 578 U.S. at 340 (internal quotation
 8 marks omitted). But “intangible harm” and “the risk of real harm” can satisfy the concreteness
 9 requirement. *Id.* at 340–41; *see also Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 779 (9th
 10 Cir. 2018). “A ‘particularized injury’ is one that ‘affect[s] the plaintiff in a personal and
 11 individual way.’” *Safer Chems., Healthy Fams. v. U.S. Env’t Prot. Agency*, 943 F.3d 397, 411
 12 (9th Cir. 2019) (quoting *Spokeo*, 578 U.S. at 339). “[S]tanding does not require exercises in
 13 futility.” *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002).

14 To be fairly traceable to the challenged conduct, “there must be a causal connection
 15 between the injury and the conduct complained of.” *Lujan*, 504 U.S. at 560. To be redressable,
 16 “it must be likely, as opposed to merely speculative, that the injury will be redressed by a
 17 favorable decision.” *Id.* (internal quotation marks omitted).

18 Defendants argue that because Peridot likely would not have scored high enough to
 19 receive one of the eight King County licenses, it cannot show that “but for the challenged
 20 provisions, it would have received a license,” and therefore, Peridot has not established harm,
 21 traceability, or redressability. Dkt. 15 at 9–10.

22 Peridot responds that whether its application would have scored high enough to obtain a
 23 license is immaterial, because LCB rejected its application based solely on the residency
 24

1 requirement and that unconstitutional exclusion from the program is enough to establish
2 standing. Dkt. 25 at 6–7.

3 Peridot has satisfied each of the three elements of standing. First, Peridot alleges an
4 injury in fact. *See Perry*, 18 F.4th at 630. Peridot’s alleged injury, exclusion from the competitive
5 application process, is concrete and particularized. LCB eliminated Peridot’s application at the
6 screening stage for failure to meet the residency requirement, thus denying Peridot the
7 opportunity to participate in the competitive process. Exclusion from the competitive process is
8 itself a concrete injury. *See Peridot Tree, Inc. v. City of Sacramento*, No. 2:22-CV-00289-KJM-
9 DB, 2022 WL 10629241, at *3 (E.D. Cal. Oct. 18, 2022) (“Winning the 100-meter dash is no
10 guarantee of a podium finish in a decathlon, but an athlete who is wrongly barred from starting
11 that race has certainly been hampered in her hunt for the overall gold. [Plaintiffs] similarly fell
12 out of the race right from the start. Here, there is a concrete injury in the necessary sense.”);
13 *NPG, LLC v. City of Portland*, No. 20-00208-NT, 2020 WL 4741913, at *6 (D. Me. Aug. 14,
14 2020) (“[Plaintiffs’] alleged injury is not the denial itself but the disadvantage they face in
15 obtaining a license due to the City’s [policy].”); *see also Regents of Univ. of Cal. v. Bakke*, 438
16 U.S. 265, 280 n.14 (1978) (determining plaintiff not required to prove he would have been
17 admitted to medical school but for challenged race-based admissions program because university
18 denied him opportunity to compete for all slots in class). As to Peridot’s claims challenging the
19 scoring criteria that favor residents but do not exclude others, ability to compete evenly also
20 constitutes injury in fact. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of*
21 *Jacksonville*, 508 U.S. 656, 666 (1993) (“[T]he “injury in fact” is the inability to compete on an
22 equal footing in the bidding process, not the loss of a contract.”). Thus, whether Peridot would
23 have scored highly enough to receive a license even without the criteria favoring Washington
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1 residents is immaterial; deprivation of the right to participate and compete evenly in the
 2 application process constitutes an injury in fact.

3 Second, Peridot satisfies the traceability element. *See Perry*, 18 F.4th at 630. LCB's
 4 decision to reject Peridot's application for failure to meet the residency requirements caused
 5 Peridot's exclusion from the competitive process.

6 Third, Peridot's alleged injury is redressable. Whether a claim is redressable depends on
 7 whether the court is capable of providing relief that redresses the injury, and not whether the
 8 plaintiff's proposed relief redresses the injury. *See Kirola v. City & County of San Francisco*,
 9 860 F.3d 1164, 1176 (9th Cir. 2017) ("[Plaintiff's] proposed injunction does not control whether
 10 her claims are redressable. The district court is not bound by [plaintiff's] proposal, and may enter
 11 any injunction it deems appropriate, so long as the injunction is no more burdensome to the
 12 defendant than necessary to provide complete relief to the plaintiffs." (internal quotation marks
 13 omitted)). Thus, even if Peridot's requested preliminary relief—enjoining Defendants from
 14 issuing the current round of Social Equity Program licenses—would not redress its alleged
 15 injury, the Court could redress Peridot's injury by enjoining Defendants from applying criteria
 16 that requires or favors Washington residency in future rounds of applications.

17 Defendants cite *Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 457 F.3d 941 (9th
 18 Cir. 2006) and *Orion Wine Imps., LLC v. Appelsmith*, 837 F. App'x 585 (9th Cir. 2021) to
 19 support their argument that a favorable ruling would not remedy Peridot's alleged injury. Dkt. 15
 20 at 10. In both cases, unchallenged regulatory provisions would have caused the same alleged
 21 injury to the plaintiff as the challenged provisions, even if the court struck the challenged
 22 provisions. *Nuclear Info.*, 457 F.3d at 955; *Orion Wine Imps.*, 837 F. App'x at 586. Defendants
 23 argue that unchallenged provisions of Washington's Social Equity Program—presumably the
 24 location-neutral rubric criteria—mean that "Peridot would have been unlikely to have had a

1 score high enough to have its application in final consideration for one of the eight licenses.”
 2 Dkt. 15 at 9. But as the Court discussed previously, Peridot’s alleged injury is exclusion from the
 3 competitive process, and not denial of a license. No unchallenged rubric criterion or other
 4 regulatory provision would definitively disqualify or outright exclude Peridot from the
 5 competitive process, and Peridot’s success would depend on the other applicants under
 6 consideration.

7 Peridot has therefore established standing to seek a preliminary injunction on its dormant
 8 Commerce Clause claims challenging the Washington regulations that require or favor residency
 9 to acquire a cannabis retail license.

10 **C. Peridot cannot show a likelihood of success on the merits.**

11 The Commerce Clause empowers Congress “[t]o regulate Commerce with foreign
 12 Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3.
 13 The Supreme Court has long held that the Commerce Clause “also prohibits state laws that
 14 unduly restrict interstate commerce.” *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct.
 15 2449, 2459 (2019); *see also Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 444 (9th Cir.
 16 2019). Courts refer to “[t]his ‘negative’ aspect of the Commerce Clause” as the “dormant
 17 Commerce Clause.” *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

18 Because the dormant Commerce Clause is a judicially-created doctrine that is implied
 19 from the intent of the Commerce Clause rather than found in its text, the Supreme Court has long
 20 focused on the purpose of the doctrine to interpret its limits. The “fundamental objective” of the
 21 dormant Commerce Clause is to “preserv[e] a national market for competition undisturbed by
 22 preferential advantages conferred by a State upon its residents or resident competitors.” *Gen.*
 23 *Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). By “prevent[ing] the States from adopting
 24 protectionist measures,” the dormant Commerce Clause “preserves a national market for goods

1 and services.” *Tenn. Wine & Spirits Retailers*, 139 S.Ct. at 2459; *see also Tracy*, 519 U.S. at 287
 2 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)) (“[The dormant] Commerce Clause
 3 prohibits taxation or regulation that discriminates or unduly burdens interstate commerce and
 4 thereby ‘imped[es] free private trade in the national marketplace.’” (internal citations omitted)).

5 Courts follow a two-tiered approach to reviewing challenges to local regulations under
 6 the dormant Commerce Clause:

- 7 (1) When a state statute directly regulates or discriminates against interstate
 commerce, or when its effect is to favor in-state economic interests over out-of-
 state interests, we have generally struck down the statute without further inquiry.
- 8 (2) When, however, a statute has only indirect effects on interstate commerce and
 regulates evenhandedly, we have examined whether the State’s interest is
 legitimate and whether the burden on interstate commerce clearly exceeds the local
 benefits.

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 11 *Id.* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579
 12 (1986)). “A discriminatory law is virtually *per se* invalid and will survive only if it advances a
 13 legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory
 14 alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (internal citations and
 15 quotation marks omitted); *see, e.g., Maine v. Taylor*, 477 U.S. 131, 151 (1986) (upholding ban
 16 on importation of baitfish into Maine because it served “legitimate local purposes that could not
 17 adequately be served by available nondiscriminatory alternatives”).

18 Peridot argues that LCB’s regulations requiring Washington residency or favoring
 19 Washington residents violate the dormant Commerce Clause because they discriminate against
 20 out-of-state applicants. Dkt. 6 at 7–9. Peridot contends that these regulations do not advance a
 21 legitimate local purpose that cannot be served by a reasonable nondiscriminatory alternative. *Id.*
 22 at 10. But Peridot’s arguments all rest on the assumption that the traditional dormant Commerce
 23 Clause analysis applies to the cannabis market despite that market remaining illegal under
 24 federal law.

1 Peridot does not cite any Ninth Circuit or district court decision within the Ninth Circuit
2 that holds the dormant Commerce Clause bars a residency preference or requirement for a
3 cannabis retail license. This District is the only court within the Ninth Circuit that has squarely
4 addressed this question, and it did so with respect to one of the same regulations that Peridot
5 challenges here. In that case, *Brinkmeyer v. Washington State Liquor & Cannabis Board*, No.
6 C20-5661 BHS, 2023 WL 1798173, at *11 (W.D. Wash. Feb. 7, 2023), *appeal dismissed*, No.
7 23-35162, 2023 WL 3884102 (9th Cir. Apr. 11, 2023), the Honorable Benjamin H. Settle held
8 that the dormant Commerce Clause did not apply to Washington’s six-month minimum
9 residency requirement for cannabis licenses under RCW 69.50.331(1)(b)(ii). Judge Settle
10 reasoned that citizens have neither “a federal statutory or constitutional property right to
11 cannabis while it remains federally illegal,” nor “a legal interest in participating in a federally
12 illegal market.” *Id.* at *10–11. He further explained that although the dormant Commerce Clause
13 “serves an important purpose—limiting economic protectionism by states,” maintaining a free
14 national market is not in the public interest “when Congress has explicitly acted to make the
15 market in question illegal.” *Id.* at *11 (quoting *Ne. Patients Grp.*, 45 F.4th at 559 (Gelpí, J.
16 dissenting)). Judge Settle concluded that “[t]he dormant Commerce Clause does not apply to
17 federally illegal markets, including Washington’s cannabis market and, thus, it does not apply to
18 Washington’s residency requirements.” *Id.*

19 In arguing that this Court should not follow *Brinkmeyer*, Peridot leans heavily on the
20 First Circuit, which is so far the only circuit court to have addressed this issue and held that the
21 dormant Commerce Clause barred a residency requirement for officers and directors of medical
22 cannabis dispensaries in Maine. *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of*
23 *Me.*, 45 F.4th 542 (1st Cir. 2022). The court found that an interstate medical cannabis market
24 existed even though that market was illegal federally. *Id.* at 547. The court further concluded that

1 “given the nature of the specific federal legislative context in which this case arises,” Congress’s
 2 affirmative exercise of its Commerce Clause power to regulate (through criminalization) the
 3 medical cannabis market does not nullify the applicability of the dormant Commerce Clause to
 4 the same market. *Id.* at 548. The court also rejected the defendants’ argument that the challenged
 5 state regulation did not violate the dormant Commerce Clause because Congress impliedly
 6 consented to it through the Controlled Substances Act. *Id.* at 551.

7 But *Northeast Patients Group* dealt solely with medical cannabis, and the court based its
 8 holding in part on the impact of Congress’s action through the Rohrabacher-Farr Amendment,
 9 which prohibits the Department of Justice from using its appropriated funds to prevent states
 10 from implementing laws legalizing medical cannabis. *See id.* at 553–56 (citing Consolidated
 11 Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, § 530 (2022) (“Rohrabacher-Farr
 12 Amendment”)). In the First Circuit’s view, the Rohrabacher-Farr Amendment demonstrates a
 13 congressional “expectation that an interstate market [in medical cannabis] would continue to
 14 operate,” *id.* at 553, and the existence of the market alone is sufficient to trigger dormant
 15 Commerce Clause protection. To the extent that *Northeast Patients Group* hinges on the impact
 16 of the Rohrabacher-Farr Amendment, this case is distinguishable; that amendment applies only
 17 to medical cannabis, and in contrast, the exercise of discretion by the executive branch to refrain
 18 from prosecuting retail cannabis sales that are legal under state law cannot demonstrate
 19 Congress’s intent with respect to its Commerce Clause authority.

20 But more importantly from this Court’s perspective, the majority decided *Northeast*
 21 *Patients Group* over a dissenting opinion in which Judge Gelpí persuasively argued that the
 22 dormant Commerce Clause does not apply to federally illegal markets: “The Commerce Clause
 23 does not recognize an interest in promoting a competitive market in illegal goods or services or
 24 forestalling hypothetical interstate rivalries in the same.” *Id.* Judge Gelpí reasoned that the

1 dormant Commerce Clause presumes that “the public interest is best served by maintaining an
 2 unencumbered ‘national market for competition’ in legal goods and services. However, it makes
 3 little sense to retain this presumption when Congress has explicitly acted to make the market in
 4 question illegal.” *Id.* (internal citations omitted). He contended that “illegal markets are
 5 constitutionally different in kind” than legal markets, and thus disagreed with the majority “that
 6 the Commerce Clause protects the free-flowing operation of national markets that Congress has
 7 already made illegal through its Commerce Clause power.” *Id.* at 559 (Gelpí, J., dissenting).

8 This Court agrees with the analysis in *Brinkmeyer* and Judge Gelpí’s *Northeast Patients*
 9 *Group* dissent. The purpose of the dormant Commerce Clause is to preserve a competitive
 10 interstate market. *See Tracy*, 519 U.S. at 299. Here, Congress has exercised its Commerce Clause
 11 power to prohibit an interstate cannabis market. *See Gonzalez v. Raich*, 545 U.S. 1 (2005). The
 12 Court does not deny that an interstate cannabis market exists. And the Court recognizes that
 13 Washington’s intrastate cannabis market affects this interstate cannabis market, which is not
 14 immune from economic protectionism. But it makes little sense why the dormant Commerce
 15 Clause would protect an interstate market that Congress affirmatively prohibited, given that
 16 protecting this market would facilitate illegal interstate activity. Peridot cannot use the dormant
 17 Commerce Clause to demand a constitutional right to participate in an illegal interstate market.

18 In addition to the First Circuit, Peridot points to several district courts that have
 19 concluded the dormant Commerce Clause proscribes or likely proscribes similar residency
 20 requirements. Dkt. 6 at 10, 15 (citing *Toigo v. Dep’t of Health & Senior Servs.*, 549 F. Supp. 3d
 21 985, 990 (W.D. Mo. 2021); *Ne. Patients Grp. v. Me. Dep’t of Admin. & Fin. Servs.*, 554 F. Supp.
 22 3d 177 (D. Me. 2021) *aff’d sub nom. Ne. Patients Group*, 45 F.4th 542; *Lowe v. City of Detroit*,
 23 544 F. Supp. 3d 804, 813 (E.D. Mich. 2021); *NPG*, 2020 WL 4741913, at *6; *Variscite NY One, Inc. v. New York*, 640 F. Supp. 3d 232, (N.D.N.Y. 2022), *reconsideration denied*, No.

122CV1013GLSDJS, 2023 WL 1420662 (N.D.N.Y. Jan. 31, 2023)).² But none of these courts
 2 are within the Ninth Circuit, and others, including this district and the Eastern District of
 3 California, have reached different conclusions. *See, e.g., Brinkmeyer*, 2023 WL 1798173, at *13
 4 (upholding residency requirement because dormant Commerce Clause does not apply to illegal
 5 market); *Peridot Tree, Inc.*, 2022 WL 10629241, at *11 (declining to reach merits by invoking
 6 general abstention); *Original Invs., LLC v. State of Okla.*, 542 F. Supp. 3d 1230, 1235 (W.D.
 7 Okla. 2021) (dismissing case because to hold otherwise would facilitate plaintiff’s participation
 8 in federally criminal activities). This Court is persuaded that *Brinkmeyer* is correct, and Peridot is
 9 therefore unlikely to succeed on the merits of its dormant Commerce Clause challenge. At most,
 10 these split decisions show “serious questions” under the post-*Winter* Ninth Circuit preliminary
 11 injunction standard. *See Roman*, 977 F.3d at 941 (quoting *All. for the Wild Rockies*, 632 F.3d at
 12 1135) (“[W]here the ‘balance of hardships . . . tips sharply towards the plaintiff,’ a plaintiff need
 13 only show ‘serious questions going to the merits,’ rather than likelihood of success on the
 14 merits.”). But as discussed below, the balance of hardships also tips toward Defendants.

15 **D. Peridot has not established a likelihood of irreparable harm.**

16 The Court next considers the possibility of irreparable harm should it deny preliminary
 17 injunctive relief. Peridot argues that a constitutional violation is an irreparable harm, even if
 18 damages are available. Dkt. 6 at 11 (citing *Am. Trucking Ass’ns*, 559 F.3d at 1058–59). It is true
 19 that when a plaintiff establishes a likelihood of success on the merits of a constitutional claim,
 20 “that showing usually demonstrates he is suffering irreparable harm no matter how brief the
 21 violation.” *Baird*, 81 F.4th at 1040. But here Peridot is unlikely to prevail on the merits of its
 22 dormant Commerce Clause claim, or at best has raised serious questions based on conflicting

23
 24 ² See *Brinkmeyer*, 2023 WL 1798173, at *4, for an overview of cases addressing dormant
 Commerce Clause challenges to residency requirements for cannabis licenses.

1 decisions outside this circuit. Accordingly, there is a possibility, but not a likelihood, of
2 irreparable harm from the alleged constitutional violation.

3 Peridot maintains that it would also suffer the irreparable harm of exclusion from
4 Washington's cannabis market because to Peridot's knowledge, the LCB does not intend to issue
5 additional licenses. Dkt. 6 at 11. But Defendants assert there will be future application rounds for
6 cannabis retail licenses, noting that the Washington legislature authorized 52 additional Social
7 Equity Program licenses and that the LCB has begun rulemaking for these licenses. Dkt. 15 at
8 22. Peridot contends that even if future licenses are available, the delay would deprive Peridot of
9 the advantages of early entry into the market. Dkt. 6 at 11–12. But Peridot would not have
10 received these advantages because a significant and established cannabis retail market existed in
11 Washington before the Social Equity Program began. Moreover, Peridot has not shown that its
12 application would have received a high enough score to win one of the eight King County
13 licenses but for the challenged residency requirements and preferences.

14 Finally, Peridot's delay in bringing the action implies a lack of urgency, and thus, a lack
15 of irreparable harm. *Oakland Trib., Inc. v. Chron. Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir.
16 1985) (“Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency
17 and irreparable harm.”). Peridot offered reasonable justifications for its delay in bringing the
18 action after the LCB rejected its application in September 2023. See Dkt. 25 at 3–4. But a
19 residency requirement has been in effect since 2012, the LCB created the Social Equity Program
20 in 2020, the program's regulations became effective in November 2022, and the program
21 accepted applications from March 1 to April 27, 2023. At oral argument, Peridot conceded that it
22 knew when applying that it would not meet the minimum residency requirements. It did not need
23 to wait for rejection to bring the action. See *Taniguchi*, 303 F.3d at 957 (“[S]tanding does not
24 require exercises in futility.”); *see, e.g., Brinkmeyer*, 2023 WL 1798173, at *7–8 (finding

1 standing for plaintiff that never applied for license because requiring application “would be
 2 futile—it is sufficiently clear that he does not qualify because he does not reside in
 3 Washington”).

4 Peridot has not shown irreparable harm beyond the risk of a possible-but-unlikely
 5 constitutional violation. Thus, Peridot has established a possibility, but not a likelihood, of
 6 irreparable harm.

7 **E. The balance of equities and public interest favor denying a preliminary injunction.**

8 The Court must weigh the possibility of irreparable harm to Peridot against hardship to
 9 the Defendants, others interested in the proceeding, and the public if the Court grants a
 10 preliminary injunction. *See Nken*, 556 U.S. at 434–35 (noting balance of equities and public
 11 interest *Winter* factors merge when government is a party). Peridot argues that an injunction is in
 12 the public interest because Washington’s regulation is likely unconstitutional and “[t]he public
 13 interest is further served by protection of interstate participation in a cannabis market.” *Id.* at 14.
 14 “It is always in the public interest to prevent the violation of a party’s constitutional rights.”
 15 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). But again, Peridot has shown at most
 16 serious questions going to the merits of its constitutional claim.

17 Peridot also argues that an injunction would not harm Defendants because successful
 18 applicants have not yet completed the licensing process or opened their stores. Dkt. 6 at 13–14.
 19 The Court disagrees. Washington has designed a comprehensive regulatory system aimed at
 20 keeping the cannabis market intrastate and avoiding conflicts with the laws of other states that
 21 have not legalized cannabis, such as neighboring Idaho. *See* Dkt. 18 ¶ 11. For example,
 22 Washington forbids licensees from operating outside of the state, RCW § 69.50.325, or
 23 advertising cannabis across state lines, RCW § 69.50.369(4) (“A cannabis licensee may not
 24 engage in advertising or other marketing practice that specifically targets persons residing

1 outside of the state of Washington.”). Washington also forbids cannabis sales to tribal entities
2 unless the State and the tribe have entered an agreement. RCW § 69.50.3251. This regulatory
3 system helps Washington adhere to the enforcement priorities outlined in the Cole Memo, which
4 the State describes as continuing to be “the hallmark guidance that states follow” to “prevent
5 federal interference” in the state-level legalization of cannabis. Dkt. 18 ¶ 11; *see* Dkt. 18-1 at 2
6 (prioritizing preventing “the diversion of marijuana from states where it is legal under state law
7 in some form to other states”).

8 It bears noting that this system is consistent with another continuous thread of the
9 Supreme Court’s dormant Commerce Clause jurisprudence: “the common sense of our
10 traditional recognition of the need to accommodate state health and safety regulation in applying
11 dormant Commerce Clause principles.” *Tracy*, 519 U.S. at 306. The Court has “consistently
12 recognized” the “legitimate state pursuit of such interests as compatible with the Commerce
13 Clause,” which was “never intended to cut the States off from legislating on all subjects relating
14 to the health, life, and safety of their citizens, though the legislation might indirectly affect the
15 commerce of the country.” *Id.* at 306–07 (internal quotation marks and citation omitted). “[T]he
16 Framers’ distrust of economic Balkanization was limited by their federalism favoring a degree of
17 local autonomy,” and the application of the dormant Commerce Clause by the courts must
18 “respect [this] cross-purpose as well.” *Dep’t of Revenue of Ky.*, 553 U.S. at 338.

19 The tension created by Congress’s action (or inaction) in continuing to criminalize
20 cannabis through the CSA even as an increasing number of states move toward legalization—
21 and the federal executive branch looks the other way—is in many ways an example of federalism
22 playing out. Although there might be public policy arguments for why this situation is
23 undesirable, it is not this Court’s role to use the dormant Commerce Clause to shortcut that
24 process and effectively legalize interstate participation in the cannabis market while Congress’s

1 exercise of its affirmative Commerce Clause power continues to declare that market illegal.
 2 Washington's comprehensive regulatory system serves its citizens' interests in maintaining their
 3 local autonomy to experiment with cannabis legalization while minimizing their risk of federal
 4 prosecution.

5 Finally, Peridot's requested injunction would harm successful Social Equity Program
 6 applicants who have secured storefronts, purchased equipment, or incurred other costs in reliance
 7 on the LCB's communications allowing them to begin the licensing process. *See* Dkt. 16 ¶ 15;
 8 *see, e.g.*, *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021) (noting that likelihood of
 9 irreparable harm must be "balanced against any harm . . . to the interests of people and
 10 institutions that are not parties to the case"). Enjoining Washington's residency requirements
 11 would thus cause significant hardship to Defendants and successful Social Equity Program
 12 applicants, and there is a strong public interest in not disrupting the State's efforts to keep the
 13 cannabis market intrastate. Although there is a possibility of irreparable harm from a
 14 constitutional violation and public interest in preventing the possibility of such a violation, these
 15 factors do not tip the balance of equities "sharply towards the plaintiff" such that Peridot's
 16 showing of serious questions would "warrant preliminary injunctive relief." *See Roman*, 977
 17 F.3d at 941.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court DENIES Plaintiff's motion for preliminary
 20 injunction (Dkt. 6).

21 Dated this 5th day of January, 2024.

22 
 23

24 Tiffany M. Cartwright
 United States District Court Judge